

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	:	23.02.2021
Pronounced on	:	12.03.2021

Coram:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Criminal Appeal No.396 of 2020

Kumar

...

Appellant/Accused No.1

Vs

State represented by
The Inspector of Police,
Padalur Police Station,
Perambalur District.
(Crime No.344 of 2018)

...

Respondent/Complainant

Prayer : Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code, to call for the records in Special Sessions Case No.29 of 2019 on the file of the learned Sessions Judge, Mahalir Neethimandram, Perambalur, Perambalur District, and set aside the Judgement dated 22.07.2020 and acquit the appellant of the charges leveled against him.

For Appellant : Mr.Om Sairam

For Respondent : Mr.R.Surya Prakash
Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 22.07.2020 in Special Sessions Case No. 29 of 2019 on the file of the Sessions Judge, Mahalir Neethimandram, Perambalur.

2. The respondent police originally registered a case in Crime No.344 of 2018 against five accused for the offences punishable under Sections 147, 294(b), 506(i) of IPC and Sections 5(1), 8 and 9 of the POCSO Act. After investigation, the respondent police laid a charge sheet against all the accused before the Special Judge, Mahila Court, Perambalur, since the offence against the Women especially minor child falls under the POCSO Act. The learned Special Judge took charge sheet on file in Spl.C.C.No.29 of 2019 and after completing the

formalities, framed charges against the first accused/appellant for the offence under Section 5(1) read with 6 of the Protection of Child from Sexual Offence Act and Section 9 of the Prohibition of Child Marriage Act and framed charges against A2 to A5 for the offences under Section 498(A) and 294 (b) of IPC and also framed charges against A3 for the offence under Section 506(i) of IPC.

3. On the side of the prosecution in order to prove the case of the prosecution as many as 15 witnesses were examined as P.Ws.1 to 15. 11 documents were marked as Exs.P1 to 11 and on the side of defence no witnesses were examined. After completing the examination of prosecution witnesses, in the incriminating circumstances were culled out from the evidence of the prosecution witnesses put before the appellant and he denied as false and on the side of the defence no oral and documentary evidence were produced.

4. After completing the trial and after hearing the arguments advanced on either side, the learned Special Judge convicted the first accused/appellant for the offence under Section 5(1) read with Section 6 of the Protection of Child from Sexual Offence Act and also Section 9 of the Prohibition of Child Marriage Act and sentenced him to undergo 10 years rigorous imprisonment and to pay a fine of Rs.5,000/- for the offence under Section 5(1) read with Section 6 of the Protection of Child from Sexual Offence Act and also sentenced to undergo 2 years rigorous imprisonment for the offence under Section 9 of Prohibition of Child Marriage Act and A2 to A5 were acquitted. The Trial Court found that the prosecution failed to prove the charges framed against the other accused. Now, challenging the said conviction and sentence passed by the Trial Court, the first accused/appellant herein has filed the present appeal before this Court.

5. The learned counsel for the appellant/A1 would submit that the Trial Court convicted the appellant only on the basis of the evidence of the prosecutrix/victim child and there was no corroboration and without any corroboration, the conviction, based on the evidence of the PW.2, is unsustainable, as it does not find any corroboration from the testimony of the other witnesses. The consistent case of the prosecution is that PW.2 had begotten a child, which fact has not been proved by the prosecution. PW.2 had begotten a child surrounded with suspicious. In the cross examination of the investigating officer, he had stated that the investigating officer examined PW.2 on 17.11.2018 when she had informed him that the appellant had sexual intercourse some 3 months before and she had come to know about the pregnancy a month before her examination, which is contra to the evidence of PW.12, Doctor. According to the

Doctor, when he examined PW.2 she was carrying 24 weeks baby in her uterus. Further he would submit that there is no material to show that the child which was born to the victim PW.2 was handed over to the District Collector and that the prosecution has not been successful in producing the said child to prove the paternity of the appellant. Neither PW.1 nor PW.3 would speak about the age of the victim. The prosecution has produced the Transfer Certificate through the examination of PW.10. Thus, the age of the victim cannot be held to be conclusive by marking Ex.P5-Transfer Certificate through PW.10. In the absence of the particulars of the information as regard the age being furnished, the medical evidence is totally inconsistent to the version of the prosecution. Further he would submit that Ex.P9, the report submit by PW.4, is an inadmissible evidence. The Trial Judge failed to consider the defence taken by the appellant and convicted him only based on the sole evidence of the victim without any corroboration and though rightly acquitted all other accused, the same benefit should have been extended to the appellant also. The Trial Court cannot take two different stand on the same set of facts and in a case registered against five accused, four of them have been acquitted by finding that the prosecution has not proved the case beyond all reasonable doubt and took a different stand that the prosecution had proved the case against the appellant which warrants inference of this Court.

6. The learned Government Advocate (Criminal Side) would submit that at the time of the occurrence, the age of the victim child was only 16 years and she was staying in her grandmother's house and studying DLMT. The appellant was residing opposite house in which the victim child was staying and had a friendship with her. Just 3 months prior to the occurrence i.e., on 16.11.2018, in the absence of anybody in the house, the appellant entered into the house and he made a false promise that he would marry her and compelled her and had a forceful sexual intercourse with her. Thereafter, he threatened her that, if she reveals the same to anybody, he would kill her. Thereafter, one day prior to the occurrence i.e., on 16.11.2018 at night the appellant once again threatened the victim child and had sexual intercourse. The appellant had repeated the sexual intercourse with the victim child, on 19.09.2018. The appellant married the victim child at Chelliamman Kovil and threatened her not to reveal the marriage to anybody and he went for his job as he was a lorry driver and left the victim child in his house. The other accused were residing in that house and they have not provided any food to the victim child and also they harassed her. Subsequently, the parents of the victim child went to the house of the appellant and questioned the same and the other accused had threatened them. Therefore, the case cannot be registered against all the accused. Though, the

learned Sessions Judge acquitted all other accused except A1, since the prosecution had failed to prove the offences under Section 498 (A) 294 (B), 506(i) of IPC, the appellant was convicted for the offence under Section 5(1) read with 6 of the POCSO Act, since the victim child had clearly stated that while she was a minor under 18 years, the appellant was residing opposite to her house and had repeated sexual assault on her. The victim child was produced before the Doctor. The Doctor, who examined the victim child had clearly stated that she was subjected to sexual assault. Subsequently, the victim child was also produced before the Judicial Magistrate for recording the statement under Section 164 Cr.PC. The said statement was marked as Ex.P2 and she has also produced her School Transfer Certificate marked as Ex.P5, which clearly shows that the date of birth of the victim child is 03.03.2002 and the date of the occurrence is 16.11.2018 and therefore the age of the victim child at the time of occurrence is 16 years, not completed 18 years. Therefore, the prosecution proved that the victim was a minor, she was subjected to sexual assault and the appellant is the one who committed the said offence. Therefore the Trial Court, though acquitted all the other accused, had only convicted the appellant and there is no merit in this appeal.

7. Heard Mr.Om Sairam, learned counsel appearing for the appellant and Mr.R.Surya Prakash, learned Government Advocate (Crl.Side) appearing for the State and perused the materials available on record.

8. The case of the prosecution is that the victim child was staying in her grandmother's house and studying DLMT. The appellant was residing opposite house in which the victim child was staying and had a friendship with her. Just 3 months prior to the occurrence i.e., on 16.11.2018, in the absence of anybody in the house, the appellant entered into the house and he made a false promise that he would marry her and compelled her and had a forceful sexual intercourse with her. Thereafter, he threatened her that, if she reveals the same to anybody, he would kill her. Thereafter, one day prior to the occurrence i.e., on 16.11.2018 at night the appellant once again threatened the victim child and had sexual intercourse. The appellant had repeated sexual intercourse with the victim child, on 19.09.2018. The appellant married the victim child at Chelliamman Kovil and threatened her not to reveal the marriage to anybody and he went for his job as he was a lorry driver and left the victim child in his house. The other accused were residing in that house and they have not provided any food to the victim child and also they harassed her. Subsequently, the parents of the victim child went to the house of the appellant and questioned the same and the other accused had threatened them. Therefore, they registered the case against all the

accused.

9. Since the Appellate Court as fact finding Court has to give independent findings for which it has to re-appreciate entire evidence. This Court, in order to give an independent finding, re-appreciated the evidence. The charge framed against the appellant is that the victim child is a minor under 18 years. The appellant married her and he had forceful penetrative sexual intercourse and subsequently he married her. Before the Trial Court, in order to prove the case as stated earlier, the prosecution examined 15 witnesses and marked 11 documents. The victim child was examined as PW.2. A reading of the evidence of PW.2 shows that she has clearly deposed that she knows the appellant, when she was staying in her grandmother's house and studying DLMT, while going to the school at the time the appellant used to follow her and expressed his love with her, she refused. Subsequently on the date of occurrence when she was in her grandmother's house no one was there, he entered into the house and under compulsion forcibly had a sexual intercourse even after sometime also he threatened her and not to inform anybody and has repeated the same. Further he asked her to come to school belonging to Adidravida and where also he had a forceful sexual intercourse. Like that on several times he had repeated sexual assault on her. Therefore, she got pregnant and when she informed the same to the appellant he took her to Chelliamman Kovil and tied a Thali and married her. Thereafter, since he is working as a lorry driver, he left her in his house. Subsequently there were harassment from his family members and they have not provided food to the victim child and when she informed the same to the appellant, the appellant threatened her not to inform anybody and just adjust with the family members. She gave birth to a child but no one has taken care of the child. They ignored her. Even when the nurse, who was in the hospital informed them, they were not ready to come and see her and they also insisted to abort the child and the victim child did not accept the same. After giving birth to the child, she handed over the child to the Child Line at Perambalur. Thereafter, the parents questioned the same and when her parents were threatened by the accused, the father of the victim child gave a complaint. Her parents were also examined as PWs.1 and 3 and they have deposed that the victim child was staying in her grandmother's house and studying, at the time, the appellant was residing opposite to the grandmother's house and they developed love and also without her consent he had a forceful sexual intercourse and subsequently married her. They did not inform even the parents of the victim child. The victim child also gave birth to a child and that the appellant had not taken care of the victim child.

10. In order to prove the age of the victim child, Transfer Certificate was marked as Ex.P5. As per Ex.P5-Transfer Certificate, the date of birth of the victim child was 03.03.2000 and the occurrence has taken place in the year 2018. Therefore, at the time of occurrence, the age of the victim child was only 16 years. Further, the victim child was produced before the Doctor, to conduct the medical examination, who was examined as PW.12. PW.12-Doctor has stated that the victim child was produced before her and she has opined that the victim child might be between 13 to 15 years and she lost her virgin and the victim child was pregnant at the time of examination and was 24 weeks baby was seen in her uterus.

11. From the evidence of PW.12, the age of the victim child was confirmed to be 13 to 15 years and also she was subjected to sexual assault and also she was pregnant by 24 weeks. Thereafter, the victim child was produced before the Judicial Magistrate for recording the statement under Section 164 (5) of Cr.PC, and the statement was marked as Ex.P2.

12. On a perusal of Ex.P2, it clearly shows that the victim child was produced before the Magistrate and since the victim child was minor, the Magistrate completed the formalities and recorded the statement, in which also the victim child had clearly stated that the appellant repeatedly had sexual assault on her ; subsequently, he married her and she also gave birth to the child ; since nobody was taking care of her child she handed over the child to the child help line. Though, she has stated that her in-laws were also harmful and demanded dowry the prosecution failed to establish and the Trial Court also acquitted the other accused and convicted the appellant. Challenging the acquittal of the other accused, neither the victim nor the prosecution filed any appeal. Therefore, this Court cannot reopen the said charges in the appeal without challenging the finding of the Trial Court.

13. However, the material produced by the prosecution and a careful perusal of the entire materials, this Court also finds that at the time of occurrence the victim child was minor below 18 years and she was subjected to sexual assault and the appellant is the one who had committed the same and the evidence of PW.1 has clearly established and also the statement of the Doctor's medical evidence corroborated the same and the statement recorded by the Magistrate also corroborated the evidence of the victim child. Even though, the statement recorded under Section 164 of Cr.PC by the Magistrate is not a substantiative evidence, it can be used for corroboration.

14. A reading of the previous statement given by the victim child under Section 164(5) of Cr.PC before the Judicial

Magistrate and evidence given before the Court as PW.2, she has clearly narrated the occurrence. The statement recorded under Section 164 Cr.PC, corroborated the evidence of victim child and the Doctor's evidence also corroborated the same, the victim child was subjected to penetrate sexual assault and at the time of medical examination she was pregnant and 24 weeks baby was in her uterus. Therefore, once the prosecution had established the offence under Section 9 of the POCSO Act, the presumption is in favour of the prosecution, it is for the appellant to rebut the presumption. Therefore, under these circumstances even though the prosecution would have taken steps to conduct DNA test from the appellant, victim child and the baby born to victim child but they failed to do the same, the defective investigation is not a sole ground to discard the evidence of the prosecution.

15. Considering the facts that the victim child at the time of occurrence is only 16 years ; the appellant is not a stranger and he was also residing in the opposite house in which the victim child was residing ; at the time of studying he developed an intimacy and also married her ; the Trial Court has come to the conclusion that the prosecution has proved its case beyond all reasonable doubt against the appellant. This Court also finds that the appellant has committed an offence under Section 5(1) read with 6 of the Protection of Child from Sexual Offence Act and Section 9 of the Prohibition of Child Marriage Act. Therefore, this Court does not find any merit in this appeal and the appeal is liable to be dismissed and is accordingly dismissed. The conviction and sentence passed in Spl.S.C.No.29 of 2019 by the Sessions Judge, Magalier Neethimandram, Perambalur are confirmed.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

1.The Sessions Judge, Mahalir Neethimandram,
Perambalur

2.The District Collector,
Perambalur District,
Perambalur.

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3.The Director General of Police,
Mylapore, Chennai-4.

4.The Superintendent,
Central Prison,
Tiruchirappalli.

5.The Inspector of Police,
Padalur Police Station,
Perambalur District.

6.The Public Prosecutor,
High Court, Madras.

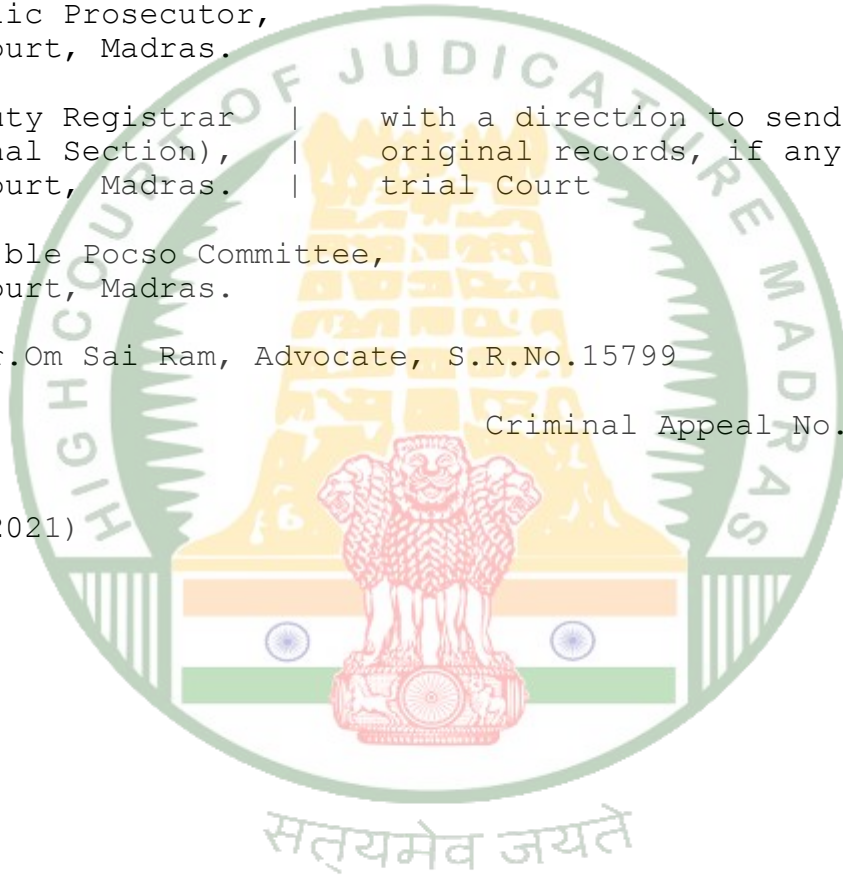
7.The Deputy Registrar | with a direction to send back the
(Criminal Section), | original records, if any, to the
High Court, Madras. | trial Court

8.The Hon'ble Pocso Committee,
High Court, Madras.

+1cc to Mr.Om Sai Ram, Advocate, S.R.No.15799

Criminal Appeal No.396 of 2020

RLD(CO)
CB(02/06/2021)



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